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IN THE
Supreme Court of the United States

OCTOBER TERM, 1948.

No. 31.

JESS LARSON, as War Assets Administrator and Surplus
Property Administrator, *Petitioner*

v.

DOMESTIC AND FOREIGN COMMERCE CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA

**PETITION FOR REHEARING AND ALTERNATIVE
MOTION TO AMEND JUDGMENT AND MANDATE.**

T. PETER ANSBERRY,
STEPHEN J. McMAHON, JR.,
Attorneys for Respondent.

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Respondent, the Domestic & Foreign Commerce Corporation respectfully petitions the Court for a rehearing of this case, or in the alternative respectfully moves that the Court amend its judgment and mandate to allow leave to the District Court to entertain a motion for leave to amend the complaint.

Introduction.

The majority opinion is based upon *Goldberg v. Daniels*, 231 U. S. 218. The paraphrases of the *Goldberg* language contained in the majority opinion, it is respectfully submitted, reveal that the Court must have been misinformed both as to the accurate but abbreviated language thereof; as to the state of the record therein; and as to the view of its author, Mr. Justice Holmes and of his brethren, on its relation to *Goltra v. Weeks*.

Other serious misapprehensions also appear in the majority opinion which it is deemed the Court would also wish to have brought to its attention.

Grounds for the Petition and Alternative Motion.

1. The majority opinion of this Court discloses that it was premised upon a misapprehension of the action taken by the Court of Appeals in this cause.

This opinion (p. 2)¹ assumes that the Courts below *did not decide the question of title* in the following language:

"A second question, related to but different from the question of breach, was *whether legal title to the coal had passed to the respondent when the contract was made*. If the contract required the deposit of funds then, of course, title could not pass until the contract terms were complied with. If, on the other hand, the contract required payment only on delivery of the documents, a question remained as to whether title nevertheless passed at the time the contract was made. Since these questions *were not decided* by the Courts below, we do not pass on them here." (*italics supplied*).

Yet, the majority opinion itself, directly at the top of the same page (p. 2) notes that the Court of Appeals reversed the District Court upon a

¹ All page references are to the pamphlet report of the opinion in the case, decided June 27, Oct. Term 1948, Number 31.

"holding that the jurisdictional capacity of the court depended on whether or not *title to the coal had passed.*" (Italics supplied.)

It is respectfully submitted that the Court of Appeals did decide that title *had passed* upon the only *pleading* before it, and that it reversed the District Court for dismissing the complaint regardless of the fact that it contained an unchallenged allegation of title in respondent.

The Court of Appeals said (165 F. 2d 235 (1947)):

"Clearly, then, it was incumbent upon the lower court in determining its jurisdictional capacity to decide the ultimate question of whether or not a contract of sale had been consummated between appellant and appellee. . . . If that contract served to vest title immediately in appellant, then it follows that the ruling in Philadelphia Co. v. Stinson is controlling here. . . . *In the complaint appellant asserted that the title to the coal had passed to it (respondent) and appellee, and his agents, was presently engaged in negotiations for the disposition of the coal to party other than the appellant. Complaint was met only by a motion to dismiss supported only by affidavits. It was at this stage of the contest that the lower court dismissed the complaint on the ground of lack of jurisdiction. The allegation should have been treated as admitted.*" (Italics supplied)

Thus the Court of Appeals *had* decided the question of title and found that upon the basis of the only pleading before it that *title was in the respondent.*

A thorough examination of all cases of record reveals that this Court's refusal to pass upon the question of title on the basis of the pleadings before it, *in this type of case,* is unique in the Court's history. The gravity of the misconceptions that can arise from this action is practically limitless; it sweeps away all the careful limitations with respect to a citizens property inherent in the whole American doctrine of sovereign immunity as enunciated by this Court throughout the years.

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(2) The majority opinion bases the decision of this case squarely upon the authority of *Goldberg v. Daniels*, 231 U. S. 218 calling upon it for the proposition that the rule has always been to disregard location of title and dismiss any complaint *regardless* of an allegation of title in the citizen.

The majority opinion here deemed the *Goldberg* case to stand for the following propositions: (Page 17).

"Suit must fail as one against the United States, the Court said, whether or not the sale was complete. In so holding, the Court said, in effect, that the question of title was immaterial to the Court's jurisdiction. Wrongful the Secretary's conduct might be, but a suit to relieve the wrong by obtaining the vessel would interfere with the sovereign behind its back and hence must fail." (Italics supplied).

Nowhere in the *Goldberg* case is there any language suggesting that the suit must fail *whether or not* the sale was complete. On the contrary, the Court *specifically* held, as its *only* ground of decision, *that title was in the United States*. Consequently the United States was a necessary party and there could have been *no* sale.

The exact language which Mr. Justice Holmes used was

"the United States is the *owner* in possession of the vessel" (231 U. S. 218). (Italics supplied.)

He also said that they saw

"no sufficient reason for throwing doubt upon the premise" (ibid.)

of the lower Court's decision; instead of, as the majority opinion misapprehends (at p. 17), it being

"expressly held that it was not necessary to decide whether the lower Courts were correct".

The lower Court had held that there had been no acceptance of the offer and therefore no sale; that the acceptance

of Goldberg's bid, because it was a mere offer (not a contract) could not be compelled upon the Secretary of the Navy. Justice Holmes merely had a more logical way of saying that title had not passed. If title has not passed, it is in the United States; and the immunity of the sovereign is then prior in logic to other reasons for denying relief.

Respondent cannot see how passage or non-passage of title did not enter into the decision of *Goldberg* when the sole reason that Justice Holmes gave for his opinion was *title in the United States*. Yet, this Court now says that location of title was "immaterial" there. It is submitted there is no escape from Holmes' meaning that title was *not* in Mr. Goldberg; and that this was the sole and controlling ground for the unanimous decision therein.

(3) The majority opinion (p. 18) perceives a conflict between the result of the *Goldberg* case and the theory of *Goltra v. Weeks*, 271 U. S. 536. It then would resolve that conflict by overruling the doctrine of the *Goltra* case.

It is respectfully suggested that before overruling an authority of the impressive stature of the *Goltra* case, the Court reexamine the *Goldberg* case and its relation to *Goltra*.

None of the members of the Court on the *Goltra* bench perceived any conflict, although the *Goldberg* case was cited in the briefs before it. Any assumption of conflict between the two cases would make it necessary to assume that Justice Holmes misunderstood his own opinion in *Goldberg* because *he himself* announced the opinion of the Court in *both* the *Goldberg* and *Goltra* cases, although the latter opinion had been prepared by Chief Justice Taft.²

(4) The majority opinion (pages 19, 20) in discussing the authority of the petitioner to construe his sales contract under the disposal statute in question says that:

² *Goltra v. Weeks*, 271 U. S. 536, at 538 footnote:

"Mr. Justice Holmes announced the opinion of the Court, the Chief Justice being absent."

"His action in doing so in this case, was, therefore, within his authority even if, for purposes of decision here, we assume that his construction was wrong, and that title to the coal had, in fact, passed to the respondent under the contract".

The doctrine thus enunciated is so broad and sweeping a change of the American doctrine of sovereign immunity that it subjects any of the billions upon billions of dollars worth of property *formerly* owned by the United States to seizure and condemnation at the pleasure of any disposal officer. The citizen is thereby limited to his statutory remedy in the Court of Claims for only the *reparable* portion of his damage, without any regard whatever to the *irreparable* portion of the citizen's damage which the courts of the land are hereby rendered powerless to remedy.

It is to be noted that the reparable portion of damage of citizens is remediable only as long as the Tucker Act stands unrepealed and the Congress continues to appropriate the money therefor.

Moreover, the decision means, from a practical standpoint, that no one can enter a property contract with the United States with any degree of certainty or firmness of contract. Instead of buying unique property, the citizen is buying a lawsuit in the Court of Claims, if this is the whim of the disposal officer,

The disposal statute here concerned confers authority to *sell* only. There is no authority to *unsell* or *condemn* under the disposal statute.

It is respectfully submitted that the results of this decision, cutting off all of respondent's irreparable damage, and the theory and far reaching consequences of the doctrine here enunciated; which sanctions lawless conduct to the extent that an officer acts under misconception of the law, are of sufficient importance to merit reargument of this cause before the *full* bench of this Court.

(5) Throughout the majority opinion there are frequent remarks on the fact that allegations of unconstitutionality lack of official authority, etc. are not made in the complaint.

Respondent's counsel believed that such legal conclusions were not well pleaded and the complaint here therefore, alleged only the ultimate facts necessary to soundly base and support these legal conclusions. But it now appears these conclusions must be pleaded as fact.

Therefore it is respectfully requested that if the petition for reargument is denied, this Court amend its mandate and judgment to allow leave to the District Court to entertain a motion for leave to amend the complaint, or such other and further relief of this nature, as the Court shall deem proper in the premises.

Respectfully submitted,

T. PETER ANSBERRY,
STEPHEN J. McMAHON, JR.

Certificate of Counsel.

We, counsel for petitioner, certify that the foregoing petition is presented in good faith and not for delay, and that in our opinion it is well founded.

T. PETER ANSBERRY,
STEPHEN J. McMAHON, JR.

July, 1949.